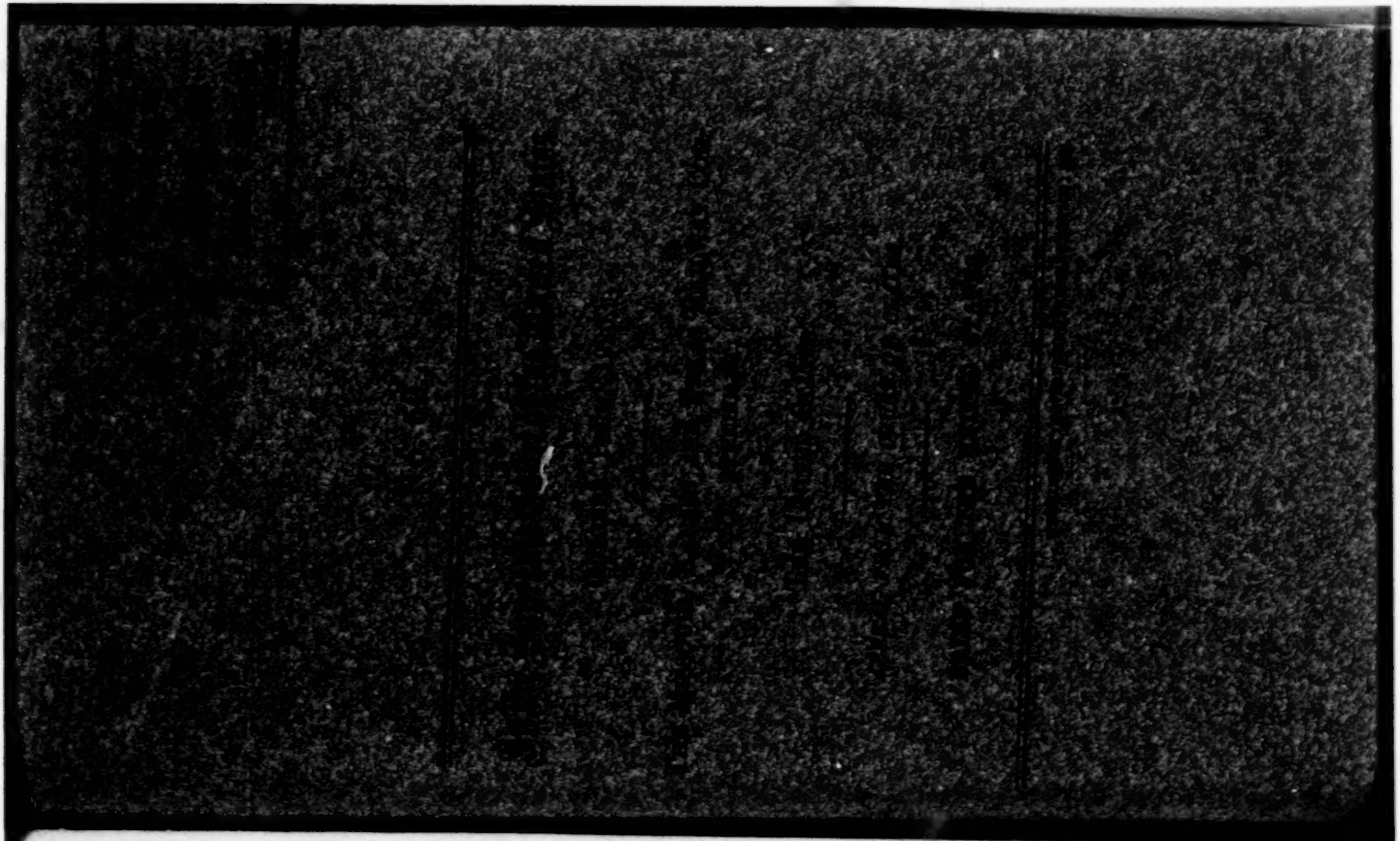

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE MISSOURI, KANSAS AND TEXAS Railway Company, appellant, *v.* THE UNITED STATES. | No. 52.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by The Missouri, Kansas & Texas Railway Company from a judgment of the Court of Claims dismissing the petition.

Prior to July 1, 1906, the appellant operated a system of railroad lines between points in Kansas, Missouri, Oklahoma, and Texas. In the month of January, 1906, it notified the Post Office Department that a fast mail service would be established on its railway system, leaving Parsons, Kans., daily and protecting a connection at Vinita, Okla., with a similar train of the St. Louis & San Francisco Railroad Company, and proceeding south to Taylor, Tex., there overtaking appellant's train No. 5, which

would proceed to Houston, Galveston, and San Antonio, Tex. The appellant submitted and filed, together with the Frisco System, the time table affecting said road and the fast mail trains with the Second Assistant Postmaster General (R. p. 14).

Thereafter, and in March, 1906, the appellant and the St. Louis & San Francisco Railroad Company notified the Second Assistant Postmaster General that the new mail train service would "positively be maintained during the period of four years commencing July 1, 1906." This official guaranty was predicated on a continuance of the then rates and regulations affecting compensation and that in the event of a change only would the railroad companies depart from this guaranty. The Post Office Department replied to this representation through the Second Assistant Postmaster General, stating that the department understood that the statement relative to the installation of fast mail service was in confirmation of previous statements made by the officers of the company relative to the establishment of such service.

The appellant transported mail over authorized routes under the terms of a readjustment of compensation which were to expire on June 30, 1910. In anticipation of that fact the Post Office Department sent "distance circulars" to appellant which it was requested to fill out with certain information and return to the Second Assistant Postmaster General. Among other things, it was requested that the appellant send two copies of its "latest working

schedule showing the trains operated over each of its postal routes." (R. p. 10.) The appellant represented in the circular that Vinita, Okla., was a railroad station on its route where mails were exchanged. (R. p. 12.)

On or about June 30, 1910, appellant returned the distance circulars to the department together with data in respect of route 153010, Kansas City to Denison, Tex., and route 153016, Parsons, Kans., to Oklahoma City, and route 155098, Sedalia, Mo., to Parsons, Kans. The circulars so returned and signed by the proper officers of the appellant contained this clause:

> The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service. (R. p. 10.)

The appellant appended to the distance circulars an additional statement "protesting against regulations and practices of the department." (R. p. 11.)

Thereafter on June 30, 1910, the Second Assistant Postmaster General in acknowledging receipt of the distance circulars, stated to appellant that note was taken of the modification made by the company in the agreement clause by which it excepted certain orders of the department and entered

> protest against other rules, regulations, or requirements of the Department with respect to the performance of service. (R. p. 12.)

and that—

> the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that in the performance of service from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of this service. (R. p. 12.)

After the appellant had replied to the notice of the Second Assistant Postmaster General, dated June 30, 1910, the letter, on August 12, 1910, again referred to this same matter in a letter of that date, addressed to appellant, wherein the Second Assistant Postmaster General stated—

> I have to advise you that, in the performance of service on this route (153010) from the beginning of the contract term named and during the continuance of such performance of service, it must be understood that your company will be subject, as in the past, to the usual customs and practices in relation to railroad mail service as well as to the conditions stated in my letter of June 30, 1910. (R., p. 12.)

After the Postmaster General had caused the mails to be weighed on the aforementioned routes, prior to July 1, 1910, and the average daily weight thereon computed, in accordance with the custom of the

department to weight the mails transported by the railroads once in every four years, and to base compensation for such transportation on the average weights of mail so ascertained, that officer in September, 1910, issued an order authorizing appellant to transport the mail on said routes at the rates stated in the several orders applicable to each of the routes. The adjustment so made covered the period from July 1, 1910, to June 30, 1914—

> Subject to future orders, and to fines and deductions, and is based on a service of not less than six round trips per week. (R., pp. 12, 13, Finding III.)

Notice of such readjustments of pay was sent to appellant, which continued to carry the mails on the fast mail train service which had been theretofore established on July 1, 1906, and on other available trains for that purpose. (R., p. 13.)

Thereafter and in January, 1912, the appellant withdrew its fast mail trains on route 153010 and there was a total discontinuance of the mail service on said trains which broke the connection at Vinita, Okla., with the fast mail trains of the St. Louis & San Francisco Railroad Company. As a consequence a large volume of Texas and Oklahoma mail was delayed. As a result, also, of the withdrawal of appellant's fast mail trains, mail, which had theretofore been diverted from other lines to those of the appellant and for which it had received credit by reason of the establishment of its fast mail train service inaugurated on July 1, 1906, was distributed

to or carried over other railway postal routes. (R., p. 15, Finding VI.)

At the time appellant's pay was readjusted from July 1, 1910, it did not notify the Post Office Department that its fast mail train service would be discontinued at any time during the four-year period beginning July 1, 1910. When the appellant withdrew its fast mail train service in January, 1912, it was notified by the Post Office Department that such action would be regarded as a violation of the contract and would subject the company to a penalty. The appellant denied any obligation on its part to operate its fast mail train service. (R., p. 15.) Because of appellant's action in discontinuing its fast mail train service the Post Office Department was obliged to provide for a redispatch of the mails in question over other lines and routes. This was done in March, 1912. (R., p. 15, Finding VI.)

The act of Congress, approved August 24, 1912 (37 Stat. c. 389, pp. 539, 554, sec. 4), making appropriations for the Post Office Department, provided—

> SEC. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to

> him as in other cases, and readjust the compensation on the routes affected accordingly: *Provided*, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: *Provided, further*, That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve.

The foregoing section was enacted to clarify questions of practice and to confer specific authority upon the Postmaster General in dealing with a situation where mails are diverted from one route to another during the period for which the railroad may have been authorized to transport the mails.

On November 22, 1912, the Second Assistant Postmaster General notified the Railway Mail Service to weigh certain mails for the purpose of ascertaining the amount of mail that had been diverted to other lines by reason of appellant's discontinuance of its fast mail trains in January, 1912. The instructions were—

> To weigh only such mails as might be definitely identified as having been formerly carried on said routes, and in case of doubt the mail should not be weighed, and the plaintiff (appellant) was advised of the action taken and that a readjustment of pay from July 1, 1912, would be based thereon. (R. p. 16.)

After the average daily weights of the diverted mails had been ascertained, and on February 21, 1913, an order was issued by the Postmaster General readjusting appellant's mail pay from July 1, 1912, on the basis of the weight of the diverted mail caused by the withdrawal of appellant's fast mail service. As a result, appellant's compensation on route 153010 was restated and decreased annually $10,914.04. On routes 153016 and 155098, also operated by appellant, an increase was allowed of $581.06 and $5,846.31, respectively. (R. p. 16.) The diverted mails which gave rise to the readjustment equalled more than 10 per centum of the average daily weight of mail to be carried on any of the routes thereby affected. (R. pp. 16, 17, Finding VII.)

The appellant received notice of the readjustment of compensation and protested against the same, to which the Second Assistant Postmaster General, on March 10, 1913, replied as follows:

> Note is taken of your statement that your company protests against the readjustment of pay on the routes referred to without a reweighing of all the mails handled on such routes and "declines to accept the compensation proposed in your letter of the 21st instant. The department is hereby notified that this company will expect compensation under the last quadrennial weighing until such time as all of the mails handled on such routes are again weighed in accordance with the laws governing same." In reply to this your attention is invited to the express language of

section 4 of the act of August 24, 1912, which provides for a "weighing of such mails" as have been diverted. The act does not contemplate a weighing of all the mails carried on the routes affected, but merely of the diverted mails. Referring to your statement that your company declines to accept the compensation stated in the adjustment orders, I have to say that such compensation is the maximum that will be paid for service on the routes in question, and the receipt by your company of such compensation is regarded by the Post Office Department as full payment for service rendered.

With respect to your statement that it can not be determined whether the diverted mails represent 10 per cent of the average daily weight on any route without weighing all of the mail on such route at the same time the diverted mails are weighed, I have to say that this apparently proceeds upon the theory that the law contemplates that the diverted mails shall equal 10 per centum of the average daily weight of each of the routes affected before a readjustment thereon is authorized by the law. The department construes the law to mean that before a readjustment on the routes shall be made it is only necessary that it be determined that the diverted mails equal at least 10 per cent of the average daily weight of any one of the routes involved in the diversion, notwithstanding the diverted mails may not equal 10 per cent of the average daily weight of every route affected.

> With this understanding of the department's construction of the law it is not believed your company will insist that the adjustment was made in violation of the law. (R. pp. 16–17, Finding VII.)

On March 25, 1913, appellant informed the Post Office Department that warrants covering its mail pay would be accepted under protest. (R. p. 17.)

On April 12, 1913, the Second Assistant Postmaster General replied that the compensation stated in the readjustment orders referred to was the maximum that would be allowed for service on the routes covered, and that the receipt by the company of such compensation was regarded by the department as full payment for services rendered thereon. (R. p. 17.)

The appellant continued to carry the mails after receipt of the last-named letter of the Second Assistant Postmaster General, and was paid the compensation fixed by the order of February 21, 1913, readjusting its mail pay.

By reason of the discontinuance of appellant's fast mail trains on July 1, 1912, and the consequent diversion of mails to other lines, readjustments of pay on such lines of railroads were made contemporaneously with the readjustment of appellant's compensation, all of which was made necessary by reason of the impairment of mail service caused by appellant's discontinuance of the kind of service which was in operation at the time it was originally authorized to transport the mail. The net result

of adjustments affecting other lines of railroad mail service was an increase in total pay of all roads concerned of $11,727.34 per annum. (R. p. 17, Finding VIII.)

The appellant's contention in substance is—

That its contract with the Government was for a period of four years from July 1, 1910, and was not subject to change by the Postmaster General during the said period.

That if the statute of 1912 changed the contract, it did so only as to future diversions.

That the mails were diverted by appellant in January, 1912, and the Postmaster General was not authorized to weigh the mails in November, 1912, for the purpose of ascertaining the amount theretofore diverted in connection with the readjustment of compensation.

That the act of 1912 does not authorize a weighing of diverted mails only.

That no readjustment could be effective until the order was issued.

The Government maintains—

1. The contract between the Government and appellant, although the pay was readjusted for four years, was terminable at the will of either party, and was subject to reservations by and in behalf of the Postmaster General.

2. Appellant impaired the character of the service which it had contracted to perform for the rate of compensation fixed by the original readjustment

order. Thereupon appellant became subject to the remedies provided in section 3962, Revised Statutes, section 7450, Compiled Statutes, also to the act of August 24, 1912, c. 389, 37 Stat., 539.

(*a*) The Postmaster General's remedy under Revised Statutes, section 3962, Compiled Statutes, section 7450, and the act of August 24, 1912, c. 389, 37 Stat., 539, 554 was applicable to the delinquency in question.

(*b*) Appellant was free to decline to carry the mails under the readjusting order and having carried them is bound by the terms of pay fixed thereby.

3. The act of August 24, 1912, was remedial and the Postmaster General's procedure thereunder was authorized thereby and did not violate any contract rights of appellant.

(*a*) The Postmaster General was authorized to weigh only the diverted mails to ascertain the effect of appellant's acts in impairing the service.

(*b*) The readjustment was properly made from July 1, 1912.

ARGUMENT.

I.

The contract between the Government and appellant, although the pay was readjusted for four years, was terminable at the will of either party, and was subject to reservations by and in behalf of the Postmaster General.

Appellant's principal contention is based upon the proposition that the contract between the Government and the railroad company was a four-year express contract the terms of which were fixed for the period from July 1, 1910, to June 30, 1914, and, therefore, that the Postmaster General had no power to make the order reducing the pay, as was done in 1912. Appellant claims that the Postmaster invited the railroad to offer service by sending it the distance circular, and by signing and filing the circular the railroad agreed to perform the service and stated its terms, which thereby became fixed contract terms for the period. Upon this theory of the contract appellant's right of recovery rests.

This same question has been presented to this court, as well as to the Court of Claims, a number of times over a period of many years and has been uniformly decided against the theory of the appellant herein.

The Postmaster General sent to the railroad company the usual distance circular in 1910 with request that it be filled out with certain information called for thereby and returned to the department. There

was a form on the distance circular containing an agreement clause to the effect that the company named agreed to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service. (R., p. 10, Finding II.) The railroad company filled out the distance circular, signed the agreement clause, with certain exceptions not necessary to mention here, and returned it to the department. This was all preliminary to the weighing of the mails upon the routes in question and the readjustment of pay stated by the Postmaster General thereafter.

The return of the distance circular with the agreement clause could not in itself constitute a contract. It was in effect an application by the railroad for the service and the orders of the Postmaster General which followed the receipt of the circular, the weighing, and the ascertainment of the average daily weight, were in effect offers of business at the prices named therein. The terms of the contract therefore are not to be found solely in the agreement clause affixed to the distance circular, but are to be ascertained as well from the terms of the orders of the Postmaster General.

The Government maintains that (*a*) the relation existing between the Government and the railroad company, appellant, was for service terminable by either party, and (*b*) that such contract as existed between the parties was subject to the specific reservation made by and in behalf of the Postmaster

General in the readjustment orders stating the pay for the new term beginning July 1, 1910, and that he acted under that reservation properly by issuing the order restating the pay from July 1, 1912.

The specific reservations were that the readjustment of pay was stated for the period named "unless otherwise ordered" and "subject to future orders and to fines and deductions." (R., p. 13, Finding III.)

The principles relied upon here by the Government have been stated in the following cases:

The nature of the contract relations arising under the state of facts existent in this case first came before this court in the case of *Eastern Railroad Company* v. *The United States*, 129 U. S. 391. It was there held that there was no contract to carry the mails for a period of four years at fixed rates, and that the reservation "unless otherwise ordered" in the order fixing pay opened the way for the Postmaster General to exercise the authority conferred and conformed with the direction of the statute of 1878 to reduce the pay. (P. 295.)

Again, in the case of the *Minneapolis & St. Louis Railway Company* v. *The United States*, 24 Ct. Cls. 350, 360, the court with great clearness stated the nature of the contract as follows:

> The voluntary compliance with the requests contained in the weight and distance circulars sent out by the Postmaster General was an application for the service of carrying the mails by the claimant corporation, and the orders of

> the Postmaster General were offers of business at the prices therein stated. Those orders and the business were subject to the provisions of the statutes and the general regulations of the Post Office Department, which the parties were bound to know, as well as to the usual and ordinary customs and practices of the department in relation to railroad mail service, with which all persons engaged in that service are presumed to be familiar. All these taken together constituted the terms of the offers, and the claimant, by taking and carrying the mails, accepted those terms.

Again, in the case of *Atchison, Topeka & Santa Fe Railway Company* v. *The United States*, 225 U. S. 640, this court sustained the action of the Postmaster General in stating the pay for railway post-office car service at less than the maximum rate during a four-year period or term, contrary to the assumption by appellant here that the distance circular created a four-year contract on terms unchangeable by the Postmaster General.

Again, in the case of the *Delaware, Lackawanna & Western Railroad Company* v. *The United States*, 249 U. S. 385, this court, affirming the judgment of the Court of Claims, held that the orders of the Postmaster General and notices fixing the compensation for the quadrennial period at certain rates but "subject to future orders" and "unless otherwise ordered" did not guarantee the railroads against any change of the rates during that period.

Again, in the *Mail Divisor Cases*, 251 U. S. 326, it was said by Justice Pitney and concurred in by Justice McKenna:

> I concur in the view of that court (53 Ct. Cls. 258, 308, 315, 318, 319) that the contract arose not out of the distance circular, * * * but arose out of what subsequently happened. (P. 339.)

Again, in *Schaff, Receiver, Missouri, Kansas & Texas Railway Company* v. *The United States*, 55 Ct. Cls. 405, the same contention was made by the claimant that it had a contract for four years at the rate of compensation named in the adjustment order, without the right in the department to diminish the rate during the period. The court held that the facts completely negative the contentions as to the character and terms of the contract and leave the case on all fours with the case of the *Delaware, Lackawanna & Western Railroad Company, supra.*

The cases relied upon by appellant in support of the contention that the distance circular created the contract do not bear out that theory. They are quite dissimilar from the cases hereinbefore cited. Reference will be made to them here briefly.

The case of *Union Pacific Railway Company* v. *The United States*, 219 Fed. 427, relied on by appellant, does not have the effect attributed to it. The point was not directly in issue in that case. The question involved related to the right of the Postmaster General to make certain deductions from the railroad's mail pay on account of the loss of regis-

tered mail and mail equipment by the railroad company; and it was held that the Government could not maintain the suit to recover damages because the matter had been previously settled by the Post Office Department by the imposition of fines and making deductions from the road's mail pay.

The case of the *Great Northern Railway Company* v. *The United States*, 236 Fed., 433, from which appellant quotes on pages 8 and 9 of its brief from the court's opinion is not similar to the instant case. Upon a careful examination it will be found that the specific contention of plaintiff in the instant case was not involved there, and, furthermore, it is clearly evident that the dictum cited from the opinion of the Circuit Court of Appeals was based upon a misapprehension of the authorities upon which it relies.

That case was one where the railway company brought suit to recover the amount of a fine stated and deducted from the company's compensation during one quadrennial term for a delinquency which occurred during the preceding quadrennial term. From the language of the opinion it appears that counsel for the United States had suggested that the contract was a continuing one and had been entered into long prior to the beginning of the quadrennial term during which the deduction was made. (P. 437.) The court held that there was a new contract beginning with the four-year term and that the terms of the contract were expressed by the Postal Laws and Regulations (to which the railroad company

had agreed to be subject by signing the agreement clause on the distance circular), and the long-established practice with reference to making deduction. However, the language which was otherwise used by the court goes further than the necessities of the case and is, therefore, *obiter dictum*. It is this language which the plaintiff quotes and relies upon and is to the effect that the contractual relations were established by the distance circular and its acceptance, and constituted a contract with terms fixed for four years. (P. 437.) This finding was entirely unnecessary for the purposes of the *Great Northern Railway Company's case*, and when the language is examined and it is found that the court relied upon the *Chicago & Northwestern Railway Company case* (104 U. S. 680), which it cites in connection with that part of its opinion, it will be seen that the court felt constrained to apply the Supreme Court's language to the case before it and overlooked the fact that the character of the contract in the *Chicago & Northwestern case* was entirely different from the character of the contract in the case before it. In the *Chicago & Northwestern case* the parties had entered into a formal time contract reduced to one instrument of writing with terms fixed for a period of four years. This was the character of contract which preceded the practice followed later when such contracts were abandoned and the relations between the railroads and the department were expressed by the distance circular, the correspondence, the orders of the Postmaster General fixing pay, and

the acceptance and performance of the service by the companies thereunder. How completely the Circuit Court of Appeals was misled in that respect is shown by the fact that the first paragraph quoted by appellant herein from the *Great Northern case* and upon which appellant relies was copied verbatim from the opinion of the Supreme Court in the *Chicago & Northwestern Railway Company case*, omitting and paraphrasing a few immaterial words. (P. 685.)

The *obiter dictum* of the *Great Northern Railway case*, relied upon by appellant, is directly at variance from the decisions of this court on the point involved here. (*Eastern Railroad Company* v. *The United States*, 129 U. S. 391, 396; *Delaware, Lackawanna & Western Railroad Company* v. *The United States*, 249 U. S. 385; *New York, New Haven & Hartford Railroad* v. *The United States*, 251 U. S. 123; the *Mail Divisor Cases*, id. 326.)

Appellant specially relies upon the case of *Chicago & Northwestern Railway Company* v. *The United States*, 104 U. S. 680. In that case, however, the facts were radically different from the facts in the instant case. There was a formal written contract between the parties by which both were bound for a period of four years in all events and neither could change the effect of the obligation so entered into without the consent of the other. It was a case where the contract obligated the railroad company to perform for the period stated and the Government was bound to pay at the rate named for the term.

In the instant case there was no formal contract for a period of four years. The contract relations were evidenced by the several steps, including the distance circular, the readjustment order, and notice to the company stating pay and the acceptance of service by the railroad company, as we have seen hereinbefore. There was no obligation upon either party to perform or pay for a definite period without power to change. The service was voluntary and the pay could be changed at any time under the reservations made by the Postmaster General. This change in the contract regulations came about soon after the act of 1873, when many railroads declined to enter into an absolute and unyielding contract for a period of four years, and thereupon the service was authorized, performed, and paid for in accordance with the practice hereinbefore described.

It needs no further argument to refute the contention of appellant as to the nature of the contract and to sustain the Government's contention that the contract relations were terminable at the will of either party; and that the Postmaster General had made specific reservations in the language referred to contained in the adjustment orders and which left it open to him to restate the rate of compensation as he might see fit during the contract period. The right of the railroad to continue or to cease service under those orders and the effect of a continuance will be referred to hereinafter.

II.

Appellant impaired the character of the service which it had contracted to perform for the rate of compensation fixed by the original readjustment order. Thereupon appellant became subject to the remedies provided in section 3962 Revised Statutes, section 7450 Compiled Statutes, also to the Act of August 24, 1912, c. 389, 37 Stat., 539.

The facts are undisputed that for four years preceding the quadrennial term in question the plaintiff was operating certain fast mail trains by reason of which large weights of mails had been attracted to its lines and for which it was receiving compensation; that it did not withdraw said trains prior to the beginning of the new contract term in 1910, but continued them and received the credit for their weights during the weighing period; that the pay for the quadrennial term beginning July 1, 1910, included pay for the weights of mails carried on such special mail trains; that the plaintiff continued the operation of said trains until 1912; and that it then, against the protest of the Postmaster General, arbitrarily withdrew said trains, causing a necessary diversion of a large amount of mails from its lines to other lines which could carry them on better schedules thereafter.

When the Postmaster General stated appellant's pay beginning July 1, 1910 (with the reservations hereinbefore mentioned), acting under Revised Statutes,

section 4002, Compiled Statutes, section 7483, he took into consideration many other factors, one of which being the "due frequency and speed" of the service then in existence and in respect to which the appellant had submitted its working schedule showing the trains then in operation. The fast mail trains in question had been previously installed with the assurance of their continued operation provided the rate of pay then effective was continued. Under the original orders appellant was allowed the maximum rates permitted by law from July 1, 1910.

Without any previously disclosed purpose to curtail the service, appellant, in January, 1912, discontinued two fast trains on one of its routes, which drew a notice from the Second Assistant Postmaster General that such action would be regarded "as a violation of the contract," which would subject the company to a heavy penalty. Notwithstanding such notice appellant withdrew or neglected to restore the former service. The result was delayed mails and a consequential diversion of a large volume of mail otherwise destined to points on appellant's routes to other lines, increasing the normal burden thereon and decreasing the burden theretofore assumed by appellant. After an investigation the Postmaster General readjusted mail pay on all the routes affected in proportion to the service thus required by the misconduct of appellant.

Appellant's action in withdrawing the special fast mail trains changed the conditions of the service performed by it and for which it had been allowed a

definite rate of pay. This delinquency warranted the Postmaster General in dealing with the situation according to the facts.

(a) The Postmaster General's remedy under Revised Statutes, section 3962; Compiled Statutes, section 7450; and the act of August 24, 1912, c. 389, 37 Stat. 539, 554, was appliable to the delinquency in question.

The contract between the Government and appellant was specifically made subject to the provisions of Revised Statutes, section 3962; Compiled Statutes, section 7450; and the terms named by the Postmaster General preceding the issuance of the adjustment orders notified the plaintiff that in the performance of service it would be subject "to all the postal laws and regulations which are now or may become applicable during the term of this service." The provisions of Revised Statutes, section 3962, and Compiled Statutes, section 7450, read as follows:

> The Postmaster General may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

The Postmaster General was authorized by statute and warranted by the terms of the contract therefore to impose fines or make deductions for the failure on the part of appellant to transport the mails upon the schedules represented and in accordance with the service for which the compensation of July 1, 1910, had been

fixed. The courts have sustained this right as exercised by the Postmaster General in cases where the mails have not been transported upon the ordinary schedule time (*Kansas City Southern Railway Company* v. *The United States*, 252 U. S. 147; *Louisville & Nashville Railroad* v. *The United States*, 53 Ct. Cls. 238), and even though such failure was due to unavoidable causes (*Chicago, Milwaukee & St. Paul Railway Company* v. *The United States*, 127 U. S. 406).

For a clear rule or direction as to the manner of proceeding in readjusting the pay on all mail routes affected by a diversion of mails, Congress enacted section 4 of the act of August 24, 1912 (37 Stat. 539, 554), upon the recommendation of the Postmaster General. This law is as follows:

> SEC. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other cases, and readjust the compensation on the routes affected accordingly: *Provided*, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: *Provided, further*, That readjustment made hereunder shall not take

> effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve.

It is submitted that what the Postmaster General did in November, 1912, in ascertaining the extent and consequence of appellant's misconduct in discontinuing its fast mail trains, and in readjusting appellant's pay in accordance with section 4 of the act of August 24, 1912, was fully authorized by the general postal laws as well as by the act mentioned. The effect of his official action was a deduction in pay for failure to maintain train schedules which delinquency was covered by the laws and regulations in force at the time the default occurred.

It is clear, therefore, that the act of August 24, 1912, was but a confirmation of practices previously authorized by the postal laws and regulations. Obviously, the intent of the act was remedial. It was only cumulative in expressly granting a discretion which might have theretofore been exercised by the Postmaster General. It provided a definite method for ascertaining the extent and consequence of appellant's breach of duty to convey the mails with "due frequency and speed" and because of its failure to maintain the fast mail service in operation when the original orders stating pay were issued.

The Postmaster General was the sole judge of the facts surrounding the delinquency in question. He acted in good faith. No vested right belonging to appellant was infringed.

(b) Appellant was free to decline to carry the mails under the readjusting order and having carried them is bound by the terms of pay fixed thereby.

Appellant was at liberty to discontinue the service or to continue in its performance under the terms named by the Postmaster General in his order readjusting the pay because of the diverted mails. Having elected to continue the service it was bound by the terms named by the Postmaster General. Mere protests without an actual discontinuance of the service availed appellant nothing. (*Eastern Railroad Company* v. *The United States, supra; Delaware, Lackawanna & Western Railroad Company* v. *The United States, supra; Texas & Pacific Railway Company* v. *The United States,* 28 Ct. Cls., 379; *Mail Divisor cases, supra; New York, New Haven & Hartford Railroad Company* v. *The United States,* 251 U. S. 123.)

III.

The act of August 24, 1912, was remedial, and the Postmaster General's procedure thereunder was authorized thereby and did not violate any contract rights of appellant.

From the foregoing considerations it will be evident that no question arises here as to whether the act of August 24, 1912, *supra*, changed the contract between the parties as argued by appellant. The only questions that may properly arise are whether the act done by the Postmaster General was authorized by the statute and did not violate any contract right of appellant.

It has been shown hereinbefore that the nature of the contract between the parties permitted the restatement of the pay by the Postmaster General during the term. The remaining questions therefore will be whether that restatement of pay was warranted by the law and the facts.

(a) The Postmaster General was authorized to weigh only the diverted mails to ascertain the effect of appellant's acts in impairing the service.

Appellant contends that the act does not authorize a weighing of the diverted mails only, but that the Postmaster General should have weighed the entire mails on the route.

Appellant bases this contention upon an alleged patent ambiguity in the language of the act, namely, that it is uncertain whether the words "such mails used in the phrase authorizing the weighing refer to all the mails on the route or the mails diverted."

A reading of the act does not suggest any ambiguity. The meaning is clear and the construction is grammatically correct for the interpretation placed upon the words by the Postmaster General. The history of the legislation shows clearly that the mails referred to were the diverted mails. The subject matter of the legislation is the diverted mails and the antecedent of "such mails" is found in the phrase immediately preceding it, where the diverted mails are referred to.

To support its theory, appellant contends that the act of 1912 repeals to some extent the provisions of the act of 1905 as to the weighing period, and by

citing authorities against repeal by implication, seeks to establish its theory that the act of 1912 did not repeal the provisions of the act of 1905, that all the mails on the route should be weighed to effect a readjustment.

Of course, this is treating the matter wholly from the point of view of the necessities of the appellant's case; but those necessities are in no wise supported by the natural and reasonable construction of the act of 1912. It was a remedial act and not intended to repeal the act of 1905.

Appellant argues further that the Court of Claims erred in sustaining the Postmaster General's exercise of discretion in weighing the mails in November, 1912, by which weighing he reached the conclusion that the diverted mails equaled at least 10 per centum of the average daily weight on any of the routes affected.

The argument is aside from the question inasmuch as the Court of Claims has found as a fact that "the amount of the mails diverted was in excess of 10 per centum average daily weight on some of the routes affected." (R., p. 17, Finding VII.)

However, it may be said that appellant's argument is at fault as it is based upon the assumption that there is a normal increase in the weight of mails after a quadrennial weighing, which, in this case, occurred in the spring of 1910. It is not inevitable that the weights of mail increased during a quadrennial term. They very often decrease on individual routes and

sometimes decrease in a whole section, as was the case in the New England section in 1907 and 1908 during the financial depression. This fact is shown in the anuual reports of the department. No changes, however, are made during the quadrennial term in the statistical basis of average daily weights, nor in the pay allowed, unless a readjustment is ordered. If the appellant's contention in this respect were correct, a railroad company could withdraw its trains with impunity after having their weights credited and paid for, provided the natural growth of the service happened to offset the amount of the diverted mails, notwithstanding the fact that in the contemplation of Congress and the judgment of the Postmaster General such increase in service had been already paid for under the original adjustment order.

Furthermore, appellant's theory overlooks the object of the statute of 1912, which was remediable as to all carrying companies involved. Its purpose was not to penalize the company from which the diversion was made, but it was to enable a readjustment of the pay of all companies involved, equitably reducing the pay of the company from which the mails were diverted and increasing the pay of the company or companies to which they were diverted.

There is nothing in the statutes, nor in the practice or custom of the service which suggests that a comparison should be made with any average daily weight other than that which had been obtained at the beginning of the term and stated at that time.

The statute merely provides that the diverted mails must equal at least 10 per centum "of the average daily weight on any of the routes affected." This clearly refers to the average daily weight stated at the beginning of the contract period. Such weights had been regularly ascertained and stated and the pay fixed thereon for the entire four-year period, "subject to future orders" and the conditions of the contract.

Furthermore, the fact that the Congress intended by the act of 1912 that the diverted mails only should be weighed is shown by its subsequent action upon the recommendation of the Postmaster General. By that action the limitation upon the Postmaster General was entirely eliminated by the repeal of the requirement that the mails diverted should equal 10 per cent. (Report of the Postmaster General for 1915, pp. 28, 67; act of May 18, 1916, section 5, 39 Stat. 161.)

(b) The readjustment was properly made from July 1, 1912.

Appellant argues that no readjustment could become effective until the order of the Postmaster General was issued, that is, from the date of said order. This theory is advanced upon the view that the railroad is not paid upon its election until the new order of compensation is made; that it can not know whether the proffered rate is advantageous or not until it is made.

To support this contention appellant relies upon the case of the *Delaware, Lackawanna & Western*

Railroad Company, supra; but the facts in that case and the language quoted therefrom by appellant are not applicable to the facts in the instant case. In the case relied upon there was a reduction in pay directed to be made by Congress and carried out by the Postmaster General; there was no change in service; there was no impairment of the service by the railroad company; there was no failure of consideration upon which the original pay had been based.

In the instant case the facts are very different. There was a change in the condition of the service and an impairment of it by the act of appellant. There was a part failure of consideration upon which the original pay had been fixed from July 1, 1910. The act of the Postmaster General was an ascertainment of the effect of appellant's delinquency. The measure of the delinquency was fairly ascertained under the direction of the act of 1912 and was otherwise fully justified by Revised Statutes, section 3962, *supra*. In making such ascertainment in accordance with these authorities and direction the Postmaster General did not introduce any new terms into the contract, but merely ascertained and stated the effect of appellant's delinquency. The delinquency occurred with the abandonment of the special mail trains in January, 1912, and continued thereafter over the objection of the Postmaster General and without any effort or endeavor upon the part of appellant to restore the service. It was in existence

on July 1, 1912, from which date the act referred to authorized the readjustment to be made under the special method therein prescribed. The diversion affected a number of lines and routes resulting in readjustments after weighings which were limited to the actual diversion, all doubts being reserved in favor of appellant (R. p. 16), affecting the pay of 39 different routes, the net result of which was an increase of $11,727.34 in railroad mail pay. (R. p. 17, Finding VIII.)

The rights of the Government were involved in the legislation, which was remedial. A remedial statute must be construed liberally so as to afford relief within the power of the court which the language of the act indicates that the legislature intended to grant. The courts will look into the occasion for the passage of such an act and consider the evils which it seeks to remedy, in order to determine whether it was intended to apply to facts which arose in the past as well as those which may arise in the future. The act is not to be construed as operating retrospectively merely because occurrences to which the same is applicable are in part drawn from a time antecedent to the passage of the act (*Johnston* v. *The United States*, 17 Ct. Cls., 157, 171).

CONCLUSION.

From the foregoing it appears—

That the readjustment of appellant's pay by the orders of the Postmaster General was warranted by appellant's delinquency and impairment of the service, for which the original compensation was allowed.

That the readjustment was made in accordance with the reservation in the contract by and in behalf of the Postmaster General, and also in accordance with the Postmaster General's right and duty under provision of law.

That the judgment of the Court of Claims dismissing the petition of the railway company was without error and should be affirmed.

Respectfully submitted.

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